United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1121

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1121

IN THE MATTER OF

THOMAS DI BELLA,

A Witness Before a Special
May, 1974 Grand Jury in the
Eastern District of New York

On Appeal From The United States District Court
For The Eastern District Of New York

REPLY BRIEF FOR APPELLANT THOMAS DI BELLA

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POINT I

MR. DEL GROSSO WAS NOT LEGALLY AUTHORIZED TO PRESENT EVIDENCE TO THE GRAND JURY. WITHIN THE CONTEXT OF THIS CONTEMPT PROCEEDING, THE WITNESS MAY PROPERLY CONTEST THE AUTHORITY OF ANY PERSON PRESENT IN THE GRAND JURY ROOM, PARTICULARLY IF THAT PERSON HAS ASKED THE QUESTIONS UPON WHICH THE FINDING OF CONTEMPT WAS BASED.

As its first line of argument, the government

argues that the appointment of Mr. Del Grosso "can reasonably be read to be an appointment under [28 U.S.C. § 543]." That statute provides:

"Special Attorneys

"(a) The Attorney General may appoint attorneys to assist United States Attorneys when the public interest so requires.

"(b) Each attorney appointed under this section is subject to removal by the Attorney General."

The government's argument is, indeed, a desperate one. The letter of appointment herein (A. 57) is absolutely devoid of any suggestion that Mr. Del Grosso was appointed "to assist" the United States Attorney. To the contrary, the letter specifically purports to designate Mr. Del Grosso as "a special attorney" with investigatory and prosecutorial powers co-extensive with that of the United States Attorney. Moreover, the letter of appointment purports to confer upon Mr. Del Grosso the power to bring prosecutions both within and without the Eastern District of New York, thus surpassing the powers of the United States Attorney for the Eastern District of New York.

The government's second line of argument is that Mr. Del Grosso is a "regular attorney of the Department of Justice" (Government Brief, p. 18), and, therefore, the words "specifically directed" contained

in 28 U.S.C. § 515 (a) are inapplicable to him, but rather, are "applicable...only to any attorney specially appointed by the Attorney General under law (who) may, when specifically directed conduct any kind of legal proceedings." (Government Brief, at p. 19). Assuming, arguendo, that a "regular attorney" may be given such a broad grant of authority, the letter of appointment clearly removed Mr. Del Grosso from the "regular attorney" status that he may have occupied prior to its issuance. It states that he is "specially retained and appointed as a special attorney". In any event, we urge that under whichever category Mr. Del Grosso belongs there does not exist any legal authority for the broad powers which the letter of appointment purports to confer upon him.

28 U.S.C. § 541 provides as follows:

> "United States Attorneys.
>
> "(a) the President shall appoint, by and with the advice and consent of the Senate, a United States Attorney for each judicial district.
>
> "(b) Each United States Attorney shall be appointed for a term of four years. On the expiration of his term, a United States Attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.
>
> "(c) Each United States Attorney is subject to removal by the President." Added Pub.L. 89-554, §4 (c), Sept. 6, 1966, 80 stat. 617.

If the government is correct, then the

policy underlying the Presidential appointment of United States Attorneys and the necessity for the advice and consent of the Senate, would both be relatively meaningless. If any number of "special attorneys" may properly be commissioned by the Assistant Attorney General in charge of the Criminal Division, with the broad powers here involved, then both the President and the Senate are deprived of the opportunity to exercise the judgment required by 28 U.S.C. § 541.

For the above noted reasons, as well as those advanced in our main brief and in Judge Werker's opinions in United States v. Crispino, it is respectfully urged that this Court should find Mr. Del Grosso to have been without lawful authority to present matters to a grand jury sitting in the Eastern District of New York.

The government further argues that, in any event, a witness before a grand jury "simply has no standing to complain about the scope of the authority of the Government attorney." (Government Brief, p. 43). This alleged lack of standing is predicated upon the claim that a "holding to the contrary would 'saddle a grand jury with mini-trial . . ."(Id). It is further argued that no defendant or witness "has the right to nullify grand jury proceedings on the ground here

urged. *** Just as an indictment may not be quashed on the ground that there was inadequate or incompetent evidence before a grand jury, a grand jury inquiry or an indictment is not subject to challenge because of the scope of authority of a government attorney 'specifically directed' by his superiors to appear before a grand jury.***" (Government Brief, at p. 43).

The authorities cited by the government in support of this last proposition are thoroughly inapposite. The witness here is not attempting to challenge the validity of the criminal statutes underlying the grand jury investigation, as in Blair v. United States, 250 U.S. 273 (1919), nor is he attacking the "reasonableness" of the grand jury investigation, as in United States v. Dionisio, 410 U.S. 1 (1973). The true issue is whether there was a person (i.e. Mr. Del Grosso) in the grand jury room who was not entitled to be there and whether the witness properly refused to answer questions put to him by that person. If the Attorney General of the United States or an Assistant Attorney General has, without the authority of law, conferred sweeping powers upon an individual such as Mr. Del Grosso, and if a witness who is subjected to the unlawfully authorized powers of such a person cannot challenge that person's authority, then no check whatsoever exists upon the unlawful exercise of authority. We urge that such a

contention would be violative of the congressional intent expressed in 28 U.S.C. §§ 515 (a) and 541. See also: Gelbard v. United States, 408 U.S. 41 (1972).

POINT II

THE EXCLUSION OF THE PUBLIC AND OF THE WITNESS'S ATTORNEY FROM THE CONTEMPT PROCEEDINGS CONSTITUTED A DEPRIVATION OF THE WITNESS'S SIXTH AMENDMENT RIGHTS TO A PUBLIC TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

In our main brief at pp. 6 and 17, we have erroneously stated that the witness was excluded from the courtroom during the testimony of the grand jury foreman and the grand jury stenographer. That error has since been noted to us by the government. The fact is that only the public and the witness's attorney were excluded from the courtroom during that critical stage of the proceedings.

Without the citation of any authority, the government argues that this did not deny the witness the effective assistance of counsel since the witness was able to communicate to his attorney his recollections concerning the testimony. The argument is absurd. In any proceeding, whether civil or criminal, a party is entitled to have his attorney examine the evidence first hand, and direct his arguments to the Court based upon such direct knowledge, rather than based upon hearsay recollections of a layman.

With regard to the exclusion of the public, the government relies upon Levine v. United States, 362 U.S. 610, at 616-619. (Government Brief, at pp. 51-3). The decision in that case turned upon the failure of a witness to request a public proceeding. In the present case, when the Court ordered the public from the courtroom, the defense requested that a friend of the witness (for all the record shows the only member of the public in the courtroom) be permitted to remain for the proceeding. That request was denied (A. 15). Moreover, when the Court permitted various personnel, not necessary to the proceeding, to remain in the courtroom, it clearly demonstrated that it was being selective as to which members of the "public" would be permitted to remain. The Court's action, therefore, is clearly distinguishable from the situation in Levine:

> "This case is wholely unlike In Re Oliver, 335 U.S. 257. This is not a case where it is or could be charged that the Judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny;*** Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises as an abstract claim only an afterthought on appeal." (362 U.S. at 619-20)

POINT III

THE WITNESS WAS JUSTIFIED IN REFUSING TO RESPOND TO QUESTIONS BEFORE THE GRAND JURY SINCE THE ORDER OF JUDGE MISHLER CONFERRING IMMUNITY AND DIRECTING THE WITNESS TO TESTIFY HAD NO VALIDITY WITH REGARD TO THE SECOND GRAND JURY APPEARANCE.

For the reasons advanced in our main brief, we reassert our contention that the earlier order of Judge Mishler, for the violation of which the witness had previously been held in contempt, no longer constituted a basis upon which the witness could properly be compelled to testify.

The government, by its citation of Maness v. Meyers, - U.S. - (1975), 43 L. W. 4143, 4151 (White, J., concurring), suggests that since the witness would have, in any event, received immunity by the direct operation of the Fifth Amendment, he had no basis to complain. That argument is frivilous. It could hardly be urged that, in the absence of authority to compel testimony, a witness can nevertheless be held in contempt for refusing to succumb to unauthorized compulsion.

Conclusion

For all of the above reasons, as well as those advanced in our main brief, it is respectfully

submitted that the judgment of contempt should be reversed and the witness should be discharged forthwith.

Respectfully submitted,

HENRY J. BOITEL and
PHILIP VITELLO
Attorneys for Appellant

April 8, 1975

Certificate of Service

HENRY J. BOITEL being a member of the Bar of the United States Court of Appeals for the Second Circuit hereby certifies that he served a copy of the within Reply Brief upon the United States Attorney for the Eastern District of New York and upon the United States Department of Justice by first class postage paid mail on April 8, 1975.

HENRY J. BOITEL

Dated: New York, New York
April 8, 1975